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IN THE

Supreme Court of the United States

October Term, 1927, No. 231.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,

Petitioner,

vs.

NORTHSIDE BELT RAILWAY COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT.

The question in this case simply is:

Whether the railroad track of the Respondent, duly chartered under the laws of the State of Texas as a terminal railway company, not a part of or in any way connected with another railroad or railway system and not engaged in any kind of commerce, either interstate or intrastate—the track to be in extent approximately five miles—may be con-

structed without the previous authorization of the Interstate Commerce Commission.

STATEMENT OF THE CASE.

The statement of the case as given in the brief for the Petitioner is in the main accurate, though some of the conclusions there stated we do not think are entirely so.

We give this as in our opinion a somewhat clearer statement.

The case grows out of a condemnation in full accordance with the laws of Texas for use as a part of Respondent's right of way, of a tract of land belonging to Petitioner in Harris County, Texas, in width, 100 feet, and in length, 1127 feet, comprising about 2½ acres.

As was its right under the statutes of Texas (Article 6336, Revised Civil Statutes of Texas of 1925), Respondent, when the suit was filed, had duly instituted the proper proceeding for the condemnation of the tract; the tract had been duly condemned and awarded to Respondent; the award by the Commissioners in the proceeding of Petitioner's damages, in the amount of $750.00, had been duly made; and this amount together with an additional amount re-

quired by law had been by Petitioner duly paid into court, and it had also duly filed the bond required by law, duly approved, all in full compliance with the laws of Texas in relation to such a proceeding.

This, under the statutes of Texas (Article 3268), entitled Respondent to immediate possession of the tract so condemned. It took such possession, and, there being no legal obstacle in the way, laid its track across aforesaid land of Petitioner on the night of the same day Petitioner filed the suit.

In a word, the taking by Respondent of possession of the strip of land and the laying of its track along it, was and is lawful under the statutes of Texas and in keeping with the right given it by those statutes.

On the filing of the suit, the Court having refused to issue a restraining order or injunction on the Petitioner's prayer, the Respondent filed its answer, directing attention to the fact that in its opinion the case was moot; setting up in full the condemnation proceedings as above recited; and further pleading that under its charter from the State it had the right to so construct its track and condemn property for its use as a right of way in that connec-

tion in accordance with the laws of the State; that it was not in any way engaged in interstate commerce or other commerce; that the only connection it contemplated with any other railroad was with the Municipal and Harbor Belt Railroad, a railroad owned by and chiefly within the City of Houston, Texas, and which was not engaged in interstate commerce or under the supervision or regulation of Interstate Commerce Commission or by law subject to its supervision or regulation; and that, by reason of the premises, neither it nor its line of railroad and operations were governed or controlled by the Interstate Commerce Act as amended, or by the Transportation Act of 1920, nor were they subject to the jurisdiction of the Interstate Commerce Commission; and further saying, in substance, that if such Acts were to be held as inhibiting its right to build its railroad track, to that extent they exceeded any powers granted to the Congress under the Constitution of the United States and to such extent were void. Record, 7-10.

The statement in Petitioner's brief as to the result in the District Court, on the appeal, etc., is correct.

THE FACTS.

As a part of the statement of the case, we be-

lieve the following summary of the facts will be helpful.

The railroad track of Respondent is in the vicinity of the City of Houston. It is or will be approximately five miles long, and situated along the Ship Channel, the deep water course extending from the City of Houston to the Gulf. Along the Ship Channel are various industries, among them those of the Galena Signal Oil Company and the American Petroleum Company, concerns in which Mr. Cullinan, President of the Respondent, is interested. The Petitioner operates its railroad in the same vicinity, and, as is manifested by this suit, is opposed to the building of any other railroad there.

The plants of the Galena Signal Oil Company and the American Petroleum Company are about two miles apart. The Galena has several miles of privately owned industrial railroad tracks on its premises. The American Company also has several miles of such tracks on its premises. There is a rail connection between the industrial tracks of these two companies. It is owned by Mr. Cullinan and is on land belonging to the Federal Investment Company in which he is interested. This rail connection between the industrial tracks of these two companies is about a

mile long. It does not belong to Respondent, nor does Respondent operate it. Record, 27.

Both the Galena Company and the American Company ship and export oil, receiving oil from and shipping oil to points beyond Texas. Record, 22. The railroad of Petitioner serves the Galena Company, having a terminus at that Company's plant. Record, 23. Oil consigned to the American Company at Galena, the terminus of Petitioner's railroad at the Galena plant, is carried by Petitioner's railroad to Galena, and from there by the switch engine of the Galena Company is moved over the rail connection above mentioned extending between the plants of the two companies. Record, 24. Mr. Cullinan testified that it was his intention to make this rail connection between the plants of the two companies a part of Respondent's railroad when built, but there was no understanding except his own that this would be done.

The railroad track of Respondent is to extend, or as already built extends, from a corner of the premises of the American Petroleum Company, westerly, a distance of approximately five miles, to an intersection with the track of the Municipal & Harbor Belt Railroad.

The Municipal & Harbor Belt Railroad was built

and is owned by the City of Houston. It handles both interstate and intrastate freight. It connects with the main lines of the different railroads entering Houston and is operated by a joint association composed of those railroads under a contract made a part of the record. Record, 21. The association so operating that railroad does not make any reports to the Interstate Commerce Commission, and files no tariffs either with that Commission or the Railroad Commission of Texas. Record, 31.

We quote as follows from the opinion of the Judge of the District Court (Record, 11-12):

> "Mr. Cullinan testified that when the road was completed it was intended to be operated. That he is interested in the Galena Signal Oil Company and the American Petroleum Company. That those companies are both engaged in the shipping and exporting of oil from points outside the state of Texas, and that they have private industrial tracks of their own. That the complainant serves the Galena Signal Oil Company and through it the American Petroleum Company. That this Northside Belt Railroad was being built to give facilities which were needed there and which ought to have been earlier built, and which the witness and those associated with him were undertaking to do because others had failed to do. That it was intended to make the industrial tracks owned by the

> American Petroleum Company a part of the Northside Belt Railway and when the work was completed to have a complete connection through the Northside Belt Railway with the Municipal Belt for those plants. That when the Northside Belt Railway was finished they expected it to be operated as a terminal railroad, with all the rights and powers which its charter gave it. That the T. & N. O. is the only railroad that operates a line down to the western terminus of the Galena Signal and when the Northside Belt was finished it would give these properties a connection with the Municipal Harbor Railroad." Record, 11-12.

No industries other than those of the Galena Signal Oil Company and the American Petroleum Company are now located on Respondent's proposed railroad. Record, 25.

The Judge of the District Court expressly found **"that the construction of this railroad neither directly nor indirectly burdens or interferes with, affects or is affected by interstate commerce in its present state, and that the Act invoked therefore has no application."** Conclusion of Opinion, Record, 13.

The injunction prayed for by Respondent was accordingly denied "without prejudice to the right of complainant to again apply when and as the activi-

ties of the defendant bring it within the purview of the Act." Record, 13.

Mr. Cullinan testified (and his testimony is without contradiction):

> **"The Northside Belt Railway Company is not now engaged in any character of commerce whatever."** Record, 27.
>
> **"The Northside Belt Railway Company is not now operating any railroad whatever." Record,** 27.

He said that "he naturally assumed that the operation of the railroad would develop into carrying cars holding interstate business." Record, 25. But in such connection he testified:

> **"The Northside Belt Railway Company is not now engaged in any character of commerce whatever. I have no kind of commitment or agreement of any character or kind with any railroad company, corporation, individual, or anyone else on earth, with respect to the receiving or transporting of interstate freight or passengers, though I hope, of course, to make such arrangements at a later time. That is all a matter for the future. That may or may not come about. I have no means of knowing now, except expectation or hope, that we will ever carry any interstate freight on that road, or not."**

It was agreed on the trial that the condemnation proceedings instituted by Respondent, above recited, were filed and completed as stated in accordance with law; that the Petitioner through its counsel participated in them, and that it entered its appeal from the final order making the award in those proceedings; and that the Respondent, after complying with the law in respect to making payment into court of the lawful amount and filing its bond, took possession of the land so condemned and on the 13th of June, 1925 (the date of the filing of Petitioner's bill of complaint), laid its track across the land and at the time of the trial was in possession thereof. Record, 21.

Also that Respondent was duly chartered under the laws of Texas as a terminal railway company; and that it had not obtained any authorization from the Interstate Commerce Commission for the construction of its railroad track. Record, 20.

WHETHER THE CASE IS NOT MOOT.

We have no disposition to raise a technical question and under it evade a decision on the merits of the case. But we believe the case is probably moot, and deem it our duty to bring this feature to the attention of the Court.

The Circuit Court of Appeals held it to be moot, and for that reason declined to consider the case on its merits. This was because the suit of Petitioner was essentially one to enjoin the prosecution by Respondent of the condemnation proceeding and the construction of Respondent's track across Petitioner's land. The condemnation proceeding had been completed when the suit was filed. True, Petitioner gave notice of its appeal from the award of the Commissioners in the proceeding. But when the suit was filed the proceeding was complete, and Respondent by complying with the law of the State in respect to paying the amount of the award into court, with an additional amount, and the filing of bond, duly approved, had done everything required by law as a condition of entitling it to take immediate possession of the land condemned, and under the law of the State had the right to so take such immediate possession.

This right was utterly unaffected by Petitioner's giving notice of appeal and on such appeal being entitled to a trial in the County Court.

The Texas statute on the subject, under the title

of "Eminent Domain," is Article 3268 of the Revised Civil Statutes of 1925, which reads:

> **"Damages paid first.**—If the plaintiff in the condemnation proceedings should desire to enter upon and take possession of the property sought to be condemned, pending litigation, it may do so at any time after the award of the commissioners, upon the following conditions, to-wit:
>
> 1. It shall pay to the defendant the amount of damages awarded or adjudged against it by the commissioners, or deposit the same in money in court, subject to the order of the defendant, and also pay the costs awarded against it.
>
> 2. In addition thereto, it shall deposit in said court a further sum of money equal to the amount of the damages awarded by the commissioners, and which shall be held, together with the award itself, should it be deposited in court instead of being paid, exclusively to secure all damages that may be awarded or adjudged against the plaintiff; and it shall also execute a bond with two or more good and solvent sureties, to be approved by the judge of the court in which such condemnation proceedings are pending, conditioned for the payment of any further costs that may be adjudged against it, either in the court below or upon appeal."

In its brief, the Petitioner speaks a number of times of its being entitled to a de novo trial of the

condemnation proceeding in the County Court, and of the track of Respondent having been laid across its land while this right subsisted. But this Article of the Texas statutes, in its third section, discloses plainly that Petitioner could not be entitled to an injunction against the prosecution of the condemnation proceeding or Respondent's taking possession of the land condemned and putting its track upon it, since in the third section of the Article it is declared and provided that if on final decision of the case it is determined that the right to condemn the land does not exist, **the plaintiff in the condemnation shall surrender possession of it, if possession has been taken pending litigation; and the court shall so adjudge and order a writ of possession for the property in favor of the defendant, and the court may also inquire what damages if any have been suffered by the defendant because of the temporary possession of the plaintiff, and order the same paid out of the award or other money deposited,**—there being thus afforded under the statute a complete legal remedy and an ample one.

We quote the third section of the Article as follows:

> "3. Should it be determined on final decision of the case that the right to condemn the prop-

> erty in question does not exist, the plaintiff shall surrender possession thereof, if it has taken possession pending litigation, and the court shall so adjudge and order a writ of possession for the property in favor of the defendant, and the court may also inquire what damages, if any, have been suffered by the defendant by reason of the temporary possession of the plaintiff, and order the same paid out of the award or other money deposited; provided, that in any case where the award paid the defendant or appropriated by him exceeds the value of the property as determined by the final judgment, the court shall adjudge the excess to be returned to the plaintiff."
>
> If the cause should be appealed from the decision of the county court, the appeal shall be governed by the law governing appeals in other cases; except the judgment of the county court shall not be suspended thereby."

Not only was the condemnation proceeding complete when the suit was filed, but Respondent, as it had full right to do under the State law, took possession of the condemned land on that date and built a track across the land. Its building of the track may have been hurried, but it was perfectly lawful under the State law and in the exercise of a plain right thereby given. Accordingly, possession of the land had been lawfully taken and construction of the track

had been lawfully made under the State law, with no violence done any order of the Federal Court, when the case came on for trial in that Court.

It is the **construction** of this railroad track which Petitioner in this case maintains must have been authorized by the Interstate Commerce Commission.

Its suit, in its very essence, is an **injunction** suit, and to restrain that **construction** across its property under the condemnation award.

That construction was an accomplished fact when the case was tried on its merits in the District Court.

This is what caused the Circuit Court of Appeals in its opinion to say:

> "This was a suit by the appellant, **which sought only a temporary restraining order and an injunction** restraining the appellee from prosecuting a suit instituted by it for the condemnation of described land of the appellant, and from constructing, maintaining, or operating a described railroad upon or across that land. The appeal is from a decree dismissing the bill without prejudice to the right of the appellant to apply in the future for an injunction against the appellee, 'if its activities in the future shall bring it properly within the purview of the act of Congress known as the Transportation Act of 1920'

It is disclosed by the record that no restraining order or interlocutory injunction was issued, and that, before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee had constructed its railroad over said land and was operating the same. As the only relief prayed for was action by the court restraining the doing of things which have been done since the suit was brought, the suit has become a moot one; it being altogether futile to forbid the doing of things which already have been done. In the situation disclosed the dismissal of the bill without prejudice was proper. Smyth vs. Asphalt Belt Ry. Co. (C. C. A.) 12 F. (2d) 14.

The decree is affirmed." Record, 49-50; 16 Fed. (2nd) 782.

The characterization of the suit in the opinion of the Circuit Court of Appeals as one only for a **temporary restraining order** and a **temporary injunction,** is entirely accurate. The bill of complaint reveals, plainly, that the only purpose of the suit was to obtain a temporary injunction against the prosecution of Respondent's condemnation proceeding and the construction of the railroad track under that proceeding across Petitioner's land. The bill alleges in next to its concluding paragraph that Respondent was "actively preparing to press the said con-

demnation suit to trial and to construct, maintain and operate the said terminal railroad upon and across the complainant's property." The prayer was that the injunction restrain the Respondent from "maintaining or operating" the railroad upon or across Petitioner's property, as well as from so constructing it. But the record is barren of any proof that there was any purpose on Respondent's part to then begin any operation of the railroad, or at any time in the near future.

The **operation** of the railroad is not involved in this case.

We have at all times conceded that prior to any operation of the railroad in interstate commerce, the authorization therefor by the Interstate Commerce Commission would be necessary.

The naked right **to build** the railroad—**to construct the track** across Petitioner's land as a power given by the State's charter, is alone the question here involved.

As showing that by the suit only a temporary injunction was sought, and a temporary restraining order until the hearing on the issuance of a temporary injunction could be had, we quote the

prayer of the bill of complaint in full, as follows:

> "Premises considered, complainant prays that upon hearing hereof this Honorable Court issue its most gracious writ of injunction, enjoining and restraining the respondent herein, its attorneys, officers, agents, servants and employees, from prosecuting the said condemnation suit and from constructing, maintaining or operating the terminal railroad aforesaid upon or across the property of the complainant herein.
>
> And complainant further shows to the Court that the said respondent is now actively preparing to press the said condemnation suit to trial and to construct, maintain and operate the said terminal railroad upon and across the complainant's property and, unless immediately restrained and prevented therefrom by a restraining order issued by this Honorable Court, will accomplish it (its)—said purpose before this cause or complainant's application for an injunction can be set down and heard."
>
> Wherefore, complainant prays the Court that it forthwith enter its temporary restraining order restraining the said respondent until further hearing hereof from doing any of the things herein sought to be enjoined." Record, 5-6.

With the condemnation proceeding complete, and with the track of the railroad already laid across Petitioner's land when the case was tried, what

was there, we ask, for a temporary injunction to operate against?

If Petitioner should finally be held entitled to prevail in the case, and its pleadings were such to warrant a court by appropriate decree to restore it to the condition it was in before the condemnation proceeding and construction of the railroad track across its land, that relief would be granted by the court's merely compelling Respondent to remove the track and by decreeing to Petitioner possession of the land. Such a remedy is in fact an ordinary decree for an abatement and for possession. It is in no proper sense an injunction of any kind. Pomeroy's Equity Jurisprudence, Volume 4, Section 1359, 4th Edition.

But the Petitioner's suit is one for an injunction—a temporary injunction, pure and simple. That is the case made by its pleading. It will not be amplified by the Court.

Because it is only such a suit and because plainly the things sought to be enjoined have already been done, and had been done when the trial was had in the District Court, and may not be undone through the office of an injunction, it is apparent, we think, as was held by the Circuit Court of Appeals, that the case is moot.

High on Injunctions, a standard text, Volume 1, Section 23, 4th Edition, declares:

> "The appropriate function of the writ of injunction is to afford preventive relief only, and not to correct injuries which have already been committed, or to restore parties to rights of which they have already been deprived. It is not, therefore, an appropriate remedy to procure relief for past injuries, and it is only to be used for the prevention of a future injury actually threatened, and to prevent the perpetration of a legal wrong for which no adequate remedy can be had in damages. And if the act sought to be enjoined has already been committed, equity will not interfere, since the granting of an injunction under such circumstances would be a useless act."

That the function of an injunction is to afford preventive relief, not to redress alleged wrongs already committed, and that it will not be used to take property out of the possession of one party and put it into that of another—as would be done here were an injunction held as properly issuable—was held by this Court in Lacassagne vs. Chapuis, 144 U. S., at page 124, in the following language:

> "The plaintiff was out of possession when he instituted this suit; and by the prayer of this bill he attempts to regain possession by means

> of the injunction asked for. In other words, the effort is to restore the plaintiff, by injunction, to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. 1 High on Injunctions, 2nd Ed. 355."

In numerous cases this Court has held that there was no controversy left in which effectual relief could be afforded under the pleading—rendering the action moot, such as a suit to enjoin revocation of an annual license, since expired, Security Mutual Insurance Company vs. Prewitt, 200 U. S., 446; a contest for an expired term of office, Tennessee vs. Condon, 189 U. S., 64; a suit to restrain Federal control of cables, now surrendered, Commercial Cable Company vs. Burleson, 250 U. S., 360, and others with like conditions.

Passing this feature, we submit as counter propositions, the following:

I.

The Interstate Commerce Act as amended and the Transportation Act of 1920 have no application to the building of such a railroad as this one, since

it is evident that its construction cannot in anywise affect interstate commerce.

II.

The State of Texas, as a sovereignty, being competent to grant unto Respondent its charter, Respondent, under that authority alone, may provide itself with the facilities whereby the powers conferred by the State may be rendered effective, and hence under that authority, may acquire its roadbed and build its track. It is entitled to a track for its intrastate business, regardless of whether in the future it operates or does not operate in interstate commerce.

ARGUMENT.

We have here a railway company that (a) is absolutely independent in ownership and character; (b) is not connected in any way with any other railroad company, and is not a part of any railroad system; (c) is not operating any railroad whatever; (d) is not engaged in any character of commerce whatever; and (e) is distinctly not engaged, in any degree, in interstate or foreign commerce.

The case presented is not one or analogous to one where State authorities are seeking to compel the erection of a union station so expensive as to unduly

deplete the financial resources of interstate carriers (Railroad Commission vs. Southern Pacific Company, 264 U. S. 331); nor is it a case where one interstate railroad seeks to construct a branch line extension which will impair its own financial resources or those of another interstate carrier (Texas & Pacific Railway Company vs. Gulf, Colorado & Santa Fe Railway Company, 270 U. S., 266).

Neither is it a case where a branch line of an interstate railway system is being operated at a loss, resulting in the depletion of the financial resources of the system, (Colorado vs. United States, 271 U. S., 153).

To none of these, is this case akin.

It more clearly presents the situation dealt with in Texas vs. Eastern Texas Railroad Company, 258 U. S., 204, than is found in any of the decisions of this Court.

As compared with that situation, it presents, however, this important distinction:

There, the railroad was in full operation. Not only so, but it had all the character of a carrier "engaged in" interstate commerce. Approximately two-thirds of its traffic was of that nature.

Here, there has been no operation at all of the railroad. It is not "engaged in" any kind of commerce, and particularly it is not "engaged in" interstate commerce. And it has none of the character or status of an interstate carrier.

In that case, Your Honors said:

> "The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate or foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce."

> "If paragraphs 18, 19 and 20 be construed as **authorizing** the Commission **to deal with the abandonment of such a road as to intrastate** as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable."

And at another place in the opinion, this:

"Like the act of which they are amendatory, these paragraphs are **expressly restricted to carriers engaged in transporting persons or property in interstate and foreign commerce.**"

And this:

"Although found in the Transportation Act, these paragraphs are amendments of the Interstate Commerce Act and are so styled. They contain **some broad language,** but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act they are to be read in connection with it and with other amendments of it. As a whole these acts show that what is intended is to regulate interstate and foreign commerce **and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class.** They contain many manifestations of a continuing purpose **to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce.**"

Further:

"These considerations persuade us that the par-

agraphs in question should be interpreted and read as **not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business."**

This notable opinion stands today as the law of the Court. No subsequent decision has in the least qualified it. What it says, is as true now, as when originally declared. It charted the authority the Interstate Commerce Commission may exercise, and that which it may not exercise, under the Transportation Act, soon after the passage of the Act. It definitely holds that **the Commission has no authority to deal with the intrastate traffic, or with the abandonment of the facilities whereby that traffic may be carried on,** of a railroad carrier, though engaged also in the carrying of interstate traffic, independently owned and not a part of another line, any shortage in whose earnings will not burden or affect interstate and foreign commerce and which no carrier in such commerce will have to bear or make good. It affirms that the continued operation solely in intrastate commerce of such a carrier **cannot be of more than local concern.**

In principle, there can be no difference between the authority or lack of authority of the Commission to deal with the abandonment of such a carrier's railroad track for interstate purposes, and its authority or lack of authority to deal with the construction of such a carrier's railroad track for such purposes.

As related to intrastate commerce, and the facilities for carrying such commerce, the Commission has gained no additional powers since that decision was rendered. Its authority over that commerce and those facilities is limited now, as it was then, by the Constitution; and, as announced by repeated decisions of this Court, is restricted to the prevention of results prejudicial to interstate and foreign commerce. It is not an absolute power. It is purely a qualified power, one incident, merely, to its authority to regulate interstate and foreign commerce, and to be exercised only in a proper regulation of that commerce.

Invoking Texas vs. Eastern Texas Railroad Company as the determinative authority in this case, it is, we maintain, perfectly idle to say that the mere naked **construction** of this five mile railroad, located wholly within the State, independently owned, and not a part, branch, or extension of another rail-

road, will or can prejudice interstate and foreign commerce.

Neither will its intrastate operation, when it comes to be operated, under the rule of the decision in Texas vs. Eastern Texas Railroad Company.

But with its operation, we are not here concerned. The question is as to its right to build and have a railroad track.

Our proposition is that since the State of Texas, as a sovereignty, undoubtedly possessed the power to charter the railroad, the railroad equally has the undoubted power to do that which will make effective the grant of authority given by the State, that is, provided the facility, namely, a railroad track, for the doing of intrastate business, independently, altogether, of whether it operates or does not operate in interstate and foreign commerce.

On this question, District Judge West, in his opinion in Smyth vs. Asphalt Belt Railway Company, 292 Federal Reporter, at page 878, said:

> "The A. B. Company, because of its incorporation under the general laws of the state of Texas applying to railroads, has the right to construct, maintain and operate a railroad wholly within the State of Texas. Obviously it has the right

under such laws to condemn private property for public use as an intrastate common carrier, whether it intended to, or afterwards did engage in interstate commerce or not."

The lawfulness of the authority of the State of Texas to grant Respondent a charter to be a railroad company for intrastate purposes and to construct a railroad line wholly within the State, is not to be questioned. The issuance by the State of the charter is of the very essence of its sovereignty, not a qualified sovereignty, but a sovereignty absolute.

Is that charter simply a parchment? Does it confer no right? May no powers be exerted under it? Was its issuance a vain and empty thing? If so, the State's power to issue it, is equally vain and impotent. If no powers may be exercised under the charter, we come at once to the proposition that there was no rightful authority in the State to issue it. To say that the privilege of exercising the rightful powers conferred by the charter is limited and may exist only through the consent of another sovereignty, is but to say that the authority to confer those powers is equally so limited.

That means the State has no free power to charter a purely intrastate railroad.

But the State unquestionably has that power and may freely exercise it. No Federal consent is required for it to do so.

It is an axiom of the law that wherever a power is rightfully granted, all things may be done which are necessary and appropriate to carry the power into execution.

A railroad company so chartered, as is this Respondent, by the State, has the clear right to do an intrastate business under purely State authority. And as a part of that right, necessary to its rightful exercise, it has the power to build its track whereby it may be enabled to enter upon that character of business.

With no power in the Congress to regulate intrastate commerce at all except as purely incidental to the exercise of its authority over interstate commerce, and, then, only to prevent its becoming a burden upon interstate commerce, it is a strange anomaly to urge that an advance of there even being any intrastate business of a railroad to regulate, before it is, or can be, known whether that business will in any wise affect interstate commerce,

when it is a matter of mere vague and fanciful speculation as to its producing any effect upon that commerce, yet, despite all this, the Congress through the Interstate Commerce Commission has the authority in advance to determine whether the railroad, under the charter of a sovereign State, may for purely intrastate purposes even have a track upon which to operate.

We respectfully submit that the proposition will not stand. It is in the face of the undoubted right of the State to charter a railroad and make its charter effective for the railroad's intrastate purposes. It substitutes the power of Congress for the power of the State, in contravention of the Constitution. It means, and can only mean, that Congress has the power, generally, to regulate intrastate commerce, regardless of whether that commerce burdens or affects interstate commerce or not. It affirms that Congress has the authority to prevent the existence of a railroad for purely intrastate purposes, though lawfully chartered by the State, by denying it the means whereby it may exist. It is a doctrine which in our opinion destroys the reserved powers of the States.

With the intrastate business of a railroad wholly

exempt from any power of Congress, except as and when it becomes a burden upon interstate commerce, we repeat that consistently with that doctrine of the Constitution there can be no power in Congress to prevent, in advance, the entering by the railroad upon intrastate business by wholly denying it the means whereby it may be conducted.

The mere provision of the facilities for such a railroad as is here involved, is of no Federal concern.

Only as the result of its **operation**, in any event, could interstate or foreign commerce be affected.

It is impossible for its mere **construction** as an independent line, unrelated to any interstate line or carrier, to have any effect upon that commerce.

And its **construction** is, therefore, necessarily exempt from any Federal control.

This, it seems to us, must be true, unless it is to be asserted that Congress has a broad and general control over all railroads and all building of railroads.

But that doctrine is emphatically denied by this Court's opinion in Texas vs. Eastern Texas Railroad Company. It was equally denied in the First Employers' Liability Cases, 207 U. S. 463.

In the latter case, it was urged in the Attorney General's brief that it was the **carrier** and not its employees which the Act under review sought to regulate, and that the **carrier** was subject to the regulation because it was engaged in interstate commerce. The Court repudiated the proposition in an emphatic opinion, and held the Act invalid because it did not restrict the liability sought to be imposed to injuries received while the employee was engaged **in operations** of the carrier **in interstate commerce.**

If, as held in Texas vs. Eastern Texas Railroad Company, the railroad there was entitled **to maintain** a track for intrastate purposes, why is not this railroad as fully entitled **to build** a track for intrastate purposes, where the building of the track here, as was true of the operation of the railroad there, cannot possibly impose any burden upon interstate commerce?

We respectfully submit that the Respondent was entitled to build its track across the Petitioner's land, and that the consent of the Interstate Commerce Commission was not required.

We pray that the writ of certiorari be dismissed, or if that be not done that the decree of the Circuit Court of Appeals affirming that of the District Court, be affirmed.

W. W. MOORE,
J. Y. POWELL,
NELSON PHILLIPS,
Solicitors for Respondent.

PHILLIPS, TOWNSEND & PHILLIPS,
Of Counsel.